

**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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KURT H. KOEHLER AND WILLIAM L. BREWSTER, AS  
EXECUTORS OF THE LAST WILL AND TESTAMENT AND  
CODICIL THERETO OF BERTHA KOEHLER, DECEASED, AND  
AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT  
AND CODICIL THERETO OF BERTHA KOEHLER, DECEASED,  
AND KURT H. KOEHLER IN HIS INDIVIDUAL CAPACITY,  
APPELLANTS

*v.*

JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN,  
THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,  
A NATIONAL BANKING ASSOCIATION, AND THE UNITED  
STATES NATIONAL BANK OF PORTLAND (OREGON),  
A NATIONAL BANKING ASSOCIATION, APPELLEES

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**BRIEF FOR TOM C. CLARK, AS SUCCESSOR TO THE ALIEN  
PROPERTY CUSTODIAN, APPELLEE**

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# **In the United States Circuit Court of Appeals for the Ninth Circuit**

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No. 11746

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**BRIEF FOR TOM C. CLARK, AS SUCCESSOR TO THE ALIEN  
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## **STATEMENT**

This is an appeal from a decision of the District Court for the District of Oregon dismissing a complaint for want of jurisdiction. The complaint was brought under Section 9 (a) of the Trading with the Enemy Act (40 Stat. 419, as amended, 50 U. S. C. App. Sec. 9 (a)). The plaintiffs-appellants here are Kurt H. Koehler and William L. Brewster, the

trustees of a testamentary trust established by the late Bertha Koehler. The defendants named in the complaint were the Alien Property Custodian and two banks—the United States National Bank of Portland (Oregon) and the Bank of California National Association. On October 16, 1947, Tom C. Clark, the Attorney General, succeeded to the functions of the Alien Property Custodian and he has been substituted as appellee in this court for the Custodian.<sup>1</sup>

There is no dispute over any of the material facts. Bertha Koehler died in Portland, Oregon, on November 20, 1943 (R. 74). Her will provided that one-half of her residuary estate should be held by the plaintiffs in trust for one Ilse Schloesser, a German national (R. 17). In September 1944, the plaintiffs, who were also executors of her estate, paid to themselves, as trustees, the property to be held in trust (R. 75). A portion of that property has remained in their hands; another portion was deposited by them in a blocked account in the defendant Bank of California; a third portion consists of certain shares of capital stock of the defendant United States National Bank, registered in the name of the decedent, Bertha Koehler.

On March 30, 1945, the Alien Property Custodian vested the right, title and interest of Ilse Schloesser in the trust (R. 45). The vesting order described the property vested as the right, title and interest of “Ilse Schloesser, and her heirs and distributees” so that

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<sup>1</sup> In this brief, the term “Custodian” will be used, as the context may require, to refer either to the Alien Property Custodian or to the Attorney General as his successor.



the interests which Mrs. Schloesser had been given by the decedent would vest in the Custodian even if Mrs. Schloesser were dead at the time of the order. It is now agreed in this proceeding that she was alive when the vesting order was issued (R. 7). The order specifically included among the rights of Ilse Schloesser which were vested, the right granted by the decedent's will to demand payment of the trust corpus. No action has been taken by the Custodian to require the trustees or the banks to pay over the trust corpus to him.

The complaint alleged the facts stated above and also alleged that Kurt Koehler, one of the trustees, was a brother of Ilse Schloesser and might, under the terms of the trust, be entitled in the future to a portion of the trust property (R. 9). The Alien Property Custodian and the two banks were named as defendants.

The relief asked by the complaint was:

1. That the right and title of the plaintiffs as trustees of the trust be "established" (R. 10).

2. That the vesting order be declared to be "erroneous" in that:

- (a) the Custodian had no right to vest the right, title and interest of the "heirs and distributees" of Ilse Schloesser (R. 10).

- (b) Ilse Schloesser had no right to demand the trust corpus (R. 10).

- (c) the property vested was not "payable or deliverable" to or "owned or controlled" by Ilse Schloesser (R. 10, 11).

3. That the plaintiffs be declared to be entitled to administer the trust and to collect fees therefor, limited only by a restraint against payment to Ilse Schloesser if she is "at the time of such proposed distribution an enemy alien" (R. 11).

4. That the Custodian be enjoined from interfering with the plaintiffs' rights as trustees (R. 12).

5. That the defendant Bank of California be authorized and directed to transfer to the plaintiffs, as trustees, the trust property held by them (R. 12).

6. That the defendant United States National Bank be authorized and directed to transfer to the plaintiffs, as trustees, the shares of stock standing in the name of the decedent (R. 12).

7. That all of the defendants be restrained from taking any steps relating to the trust property until the rights of the plaintiffs were settled (R. 12).

The Custodian moved to dismiss this complaint on the grounds that it failed to state a cause of action and that no statute authorized a suit against the Custodian for a declaration of rights (R. 61). When this motion was taken under advisement the Custodian filed an answer which reiterated these objections (R. 63) and moved for judgment on the pleadings (R. 71). This motion was also taken under advisement and the case was tried. At the trial the only material facts established were the citizenship and residence of the plaintiffs.

On May 22, 1947, the District Court filed its findings of fact and conclusions of law (R. 73 ff). The court found the facts as stated above and concluded that, the suit being a suit against the United States,



the court had no jurisdiction "in that the United States has not consented to be made a co-defendant" (R. 77). On August 22, 1947, the plaintiffs appealed to this court (R. 79).

#### STATUTES INVOLVED

The pertinent portions of the statutes principally involved are set forth in the Appendix.

#### QUESTION PRESENTED

Whether the District Court had jurisdiction over a suit against the Alien Property Custodian to establish rights in a trust *res* which was not vested by the Custodian and has not come into his possession.

#### SUMMARY OF ARGUMENT

The only property vested or held by the Alien Property Custodian is the interest of Ilse Schloesser in the trust, ~~owned~~. The complaint here does not seek to obtain a return of that property or to establish any interest in it. It is therefore not within the terms of the consent of the United States to suit embodied in Section 9 (a) of the Trading with the Enemy Act and the District Court was without jurisdiction.

#### ARGUMENT

The court below dismissed the complaint because "the United States has not consented to be made a co-defendant" (R. 77). The appellants have construed this dismissal as resting solely on the joinder of third parties with the United States as defendants (see *United States v. Sherwood*, 312 U. S. 584 (1941)). Their brief, accordingly, is addressed to the proposi-

tion that the joinder of the defendant banks was permissible under Section 9 (a) of the Trading with the Enemy Act. Proof of that proposition, however, is not sufficient to show that the District Court erred. It must first be shown that the United States has consented to be made a defendant. Unless such consent has been given the District Court had no jurisdiction quite apart from any question of joinder, and its dismissal of the complaint was correct.

We believe that the relief sought against by the Custodian by the complaint in this case was not within the scope of the Government's consent to be sued under the Trading with the Enemy Act. This, in our view, is the major issue in the case. It is the issue which the Custodian raised in the court below by his motion to dismiss the complaint (R. 61), and his answer (R. 64), and it is the issue on which he asked the Court to rule in his favor after the trial was completed (R. 106). The issue as to joinder is secondary and need only be reached if it is first found that this suit is within the scope of the Government's consent to be sued. Since we think it quite clear that this suit is not within the scope of that consent we think it would be superfluous to respond to the appellants' arguments on the joinder question and we have not done so in this brief.

**I. A suit against the Custodian is a suit against the United States and may not be maintained unless the United States has given its consent**

The Alien Property Custodian is an officer of the United States. As an officer of the United States he may bring suit in a Federal district court under

Section 24 (1) of the Judicial Code (28 U. S. C. 41 (1) to protect and define his interests in property, an authority further confirmed by Section 17 of the Trading with the Enemy Act (50 U. S. C. App. Sec. 17). *Markham v. Allen*, 326 U. S. 490 (1946).

But, like other officers of the United States, the Custodian may not be sued in his official capacity unless the United States has consented. The United States may not be sued unless specific permission for the suit is shown.

The United States, as sovereign, is immune from suit save as it consents to be sued \* \* \*, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit (*United States v. Sherwood*, 312 U. S. 584 (1941)).

It is well settled that this doctrine is applicable to the Custodian and that a suit against him may be heard only if that suit is within the terms of the permission granted by Congress. *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591 (1924); *Pflueger v. United States*, 121 F. 2d 732, 736 (App. D.C., 1941) cert. den. 314 U. S. 617; *Cummings v. Hardee*, 102 F. 2d 622 (App. D.C., 1939), cert. den. 307 U. S. 637. This doctrine is not harsh, since, as we shall show, the Trading with the Enemy Act provides an adequate remedy for those having claims against the Custodian. But it does require that the orderly procedure prescribed by the Act be complied with in adjudicating those claims.

The appellants concede the applicability of this doctrine here. Correctly assuming that the only authority for a suit against the Custodian is that

provided in Section 9 (a) of the Trading with the Enemy Act (50 U. S. C. App. Sec. 9 (a)), they go on to assume that this suit falls within the scope of that section (App. Br., p. 10 ff.). We believe that it does not and we therefore believe that the District Court was correct in dismissing the complaint for want of jurisdiction.

## II. This suit is not within the scope of Section 9 (a) of the Trading with the Enemy Act

*A. Section 9 (a) permits suits only for return of particular property held by the Alien Property Custodian or interests in such property or its proceeds.*—Section 9 (a) of the Trading with the Enemy Act provides, in so far as here relevant:

Any person \* \* \* claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him \* \* \* may file with the said custodian a notice of his claim \* \* \*. If \* \* \* the claimant shall have filed the notice as above required \* \* \* said claimant may institute a suit in equity \* \* \* in the district court of the United States for the district in which such claimant resides \* \* \* to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance \* \* \* or delivery to said claimant of the money or other property so held by the Alien Property Custodian \* \* \* or the interest therein to which the court shall determine said claimant is entitled.

It will be seen immediately that a suit must have several characteristics before it may be brought under this section. The plaintiff must be a person not an enemy or ally of enemy. He must claim an interest in property which is held by the Custodian. The object of the suit must be to establish that interest in the property held by the Custodian and to obtain a return of it.

It is conceded that the appellants here are not enemies or allies of enemy. But this suit is not within the terms of Section 9 (a) unless the appellants seek to establish and obtain the return of an interest in property *held by the Custodian*. An interest in other property will not suffice. If they do not claim an interest in property which the Custodian has, or its proceeds, their suit is not within the terms of Section 9 (a).

This conclusion is clear not only from the terms of Section 9 (a) but also from the function of that section in the statutory scheme of the Trading with the Enemy Act. One of the purposes of the Act was to permit the Government to obtain possession of all enemy property speedily. Rather than providing for a judicial determination of enemy ownership prior to seizure, therefore, the Act permitted the Custodian to demand possession of any property which he determined to be enemy owned. 50 U. S. C. App. Section 7 (c). The demand had to be honored; a claim of nonenemy ownership would not be accepted as a ground for withholding delivery of the property upon the Custodian's demand. *Central Union Trust Co. v. Garvan*, 254 U. S. 554 (1921); *Commercial Trust*



*Co. v. Miller*, 262 U. S. 51 (1923). At the beginning of this war the scope of the Custodian's peremptory power was enlarged so to give him authority to vest the property of any foreign national without a determination of enemy status. See *Silesian-American Corp. v. Clark*, 68 Sup. Ct. 179 (Dec. 8, 1947).

This grant of authority to the Custodian to seize property peremptorily required a counterbalancing procedure by which the issue of enemy ownership of the seized property could be determined. This was provided for by Section 9 (a). After property was seized by the Custodian any person not an enemy or ally of enemy was permitted to sue the Custodian to get it back. If he did not claim the entire ownership of the vested property, he could sue to establish and get back the interest to which he was entitled. 50 U. S. C. App. Section 9 (a). In short, the function of Section 9 (a) was to provide a method by which the Custodian could be sued to establish whether the property which he had vested was enemy owned or not.<sup>2</sup>

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<sup>2</sup> This method of providing a judicial determination of enemy ownership was examined and found valid in *Stoeck v. Wallace*, 255 U. S. 239 (1921). The court's opinion, at p. 245, makes clear the function of a 9 (a) suit:

"There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit,



Nothing in Section 9 (a) can support a suit to establish an interest in property or rights which the Custodian does not have. As stated by the Court of Appeals for the District of Columbia in *Sigg-Fehr v. White*, 285 Fed. 949, 954 (1923) :

The right of recovery is restricted to the property seized or the proceeds derived from the sale of such property by the Custodian. This measures the jurisdiction conferred by Congress. In other words, the government has permitted itself to be sued only to the extent limited by the act. To extend this proceeding to embrace additional causes of action would amount to subjecting the sovereign to a suit  
\* \* \* over which the court has not been accorded jurisdiction.

B. *The only property held by the Custodian here consists of the right, title and interest of Ilse Schloesser.*—The only property which the vesting order in this case purported to take consisted of the right, title and interest of Ilse Schloesser in the trust created by the decedent's will. The Custodian might have vested the trust *res* itself, leaving to those nonenemies claiming an interest in that property the remedy of a suit for return under Section 9 (a) of the Act. *Stoehr*

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which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant, as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."

v. *Wallace*, 255 U. S. 239, 245 (1921). But he did not. He vested only the right, title and interest of Ilse Schloesser.

He did not vest the rights of anyone else. The vesting order contained the phrase "and her heirs and distributees" but these words would have had significance only if Ilse Schloesser had been dead at the time the order was issued. No one can be the heir of a living person. Since Mrs. Schloesser was alive at the time of the vesting order there were no persons who could then have been described as her "heirs and distributees."

Assuming, as the appellants have alleged, that Kurt H. Koehler had a contingent remainder interest in the trust rather than a mere expectancy, the Custodian did not vest that interest. Kurt H. Koehler was not an heir or even an heir presumptive of Ilse Schloesser at the time of the vesting order. His interests would have been vested only if the Custodian had attempted to take the interests in the trust of every person who might, on any conceivable sequence of events, turn out to be an heir or distributee of Ilse Schloesser at the indeterminate future time when she dies. This the Custodian certainly did not do. He used the words "heirs and distributees" in their familiar sense to avoid the possibility that his order would be construed as taking nothing in the event that Ilse Schloesser were dead at the time of the vesting. Cf. *Miller v. Schutte*, 287 Fed. 604 (App. D. C., 1923). The vesting order took her interest if she were alive at the time of the order or it took those of her heirs and distributees if she were dead.

Nor did the Custodian define the extent of the rights which he vested. He simply took whatever rights Ilse Schloesser had. Mrs. Koehler's will gave her the right to demand possession of the corpus of the trust in a certain way (R. 17), and the Custodian wanted to make it clear that this right was included in the undefined bundle which he vested. His order therefore vested

All right, title, interest and claim of any kind of character whatsoever of Ilse Schloesser \* \* \* including the right to demand \* \* \* payment and delivery \* \* \* of a certain trust fund, for which provision is made in \* \* \* clause "Third" of said will and said codicil thereto (R. 45).

Under what circumstances this right might be exercised is, of course, to be determined by the terms of the will.

The Custodian, in sum, vested the undefined quantum of rights which belonged to Ilse Schloesser. Cf. *Stern v. Newton*, 180 Misc. 241, 246, 39 N. Y. S. 2d 593, 598 (N. Y. Sup. Ct., 1943). If the trustees had any rights in the trust corpus they still have them. If Kurt H. Koehler was a contingent beneficiary of the trust he still retains his contingent interest. The vesting simply substituted the Alien Property Custodian for Ilse Schloesser, leaving all the remaining interests in the trust in *status quo*.

C. *This suit is not a suit for return of an interest in the property vested by the Custodian.*—The application of the jurisdictional limitations of Section 9 (a) to this case is clear. The Custodian is possessed of

no more than the interest which Mrs. Schloesser was given by Mrs. Koehler's will. He does not have possession of the trust property. A suit under Section 9 (a), therefore, can be maintained only by persons claiming some share of Mrs. Schloesser's interest. If the Custodian was wrong in determining that Mrs. Schloesser was an enemy, she could sue under 9 (a) to get her interest back. But a person not claiming a share of Mrs. Schloesser's interest has no standing under Section 9 (a) since he is not claiming an interest in any property held by the Custodian. It is clear here that the plaintiffs make no claim for Mrs. Schloesser's interest. They seek, rather, to establish the interests of Kurt Koehler and William L. Brewster in the trust corpus.

They thus seek to establish their rights—and limit the Custodian's—in property not held by the Custodian. This they may not do under Section 9 (a).

\* \* \* it is evident that consent of the United States to be sued in the circumstances we are considering is wholly lacking, for this is not a suit brought by a non-enemy owner to recover possession of property seized in the belief that it was enemy-owned, and in that case alone has Congress consented that the United States may be sued as to such seized property. [*Cummings v. Hardee*, 102 F. 2d 622, 627 (App. D. C., 1939) cert. den. 307 U. S. 637.]

The situation may be analogized to that which would arise if the Custodian were to vest a tract of land. If the Custodian vests "Tract A" those claiming interests in Tract A may, under Section 9 (a), bring



suit to establish those interests. But the owners of adjoining "Tract B" cannot sue under Section 9 (a) to establish the boundaries between A and B. It may be true that there is a dispute over the boundary. It may even be true that authority is given elsewhere for a suit against the United States to establish such disputed boundaries. But such a suit would not be within the scope of Section 9 (a). The dispute as to the boundary between A and B is independent of the Custodian's vesting and the suit to settle it would not determine whether Tract A belonged to an enemy or nonenemy and therefore should be retained or returned. Similarly, there may be in this case a dispute as to where the interest of Ilse Schloesser, to which the United States has succeeded, ends and where the interests of the plaintiffs begin, but that dispute is not cognizable under Section 9 (a) of the Trading with the Enemy Act.

This result can hardly give rise to any complaint by the appellants. The Alien Property Custodian has so far taken nothing from them. They still hold a major portion of the trust property. The remainder is being held by the defendant banks pursuant to freezing regulations which the appellants have not sought to satisfy by applying for a license.<sup>3</sup>

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<sup>3</sup> It should be noted that the property held by the defendant banks was "frozen" pursuant to Treasury regulations which applied prior to the Custodian's vesting order (see Executive Order 8389, as amended, 5 Fed. Reg. 1400). The appellants themselves petitioned the County Court of Multnomah County for permission to deposit the trust funds in a blocked account for Ilse Schloesser and that court granted their request and ordered them to do so (R. 23). All this took place before the Custodian vested any in-

Certainly the appellants cannot expect to obtain an adjudication of their right to keep the property they have and to obtain the remainder from the defendant banks by suing the Custodian for property which he has never had. If they wish a speedy adjudication of the extent of the rights of Ilse Schloesser to which the Custodian has succeeded they may pay over the property which they have to the Custodian and sue for its return. This is an adequate remedy. *Stoehr v. Wallace*, 255 U. S. 239 (1921). Or, if they do not wish to surrender the *res* to the Custodian, they may wait until the Custodian seeks to assert his rights and then defend against him. But they cannot keep the trust property which they have and at the same time sue the Custodian to establish their interests in it.

\* \* \* neither the lower court nor any other tribunal in or of the United States had jurisdiction to compel the Custodian to come into court and either litigate or forego his demand \* \* \*. The statute creating the Custodian enables him to capture enemy property with a sergeant and file, or otherwise *vi et armis*. He may also file a libel of possession, or he may sue in other ways; but he cannot be sued except in respect of that which he has already obtained. He can use his own method of procedure; courts cannot coerce him *in limine*. [Hough, J., concurring in *Ameri-*

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terest whatsoever. And, in any event, the appellants have not sued here for relief from the freezing controls, but for an adjudication of rights under Section 9 (a) of the Trading with the Enemy Act.



*can Exchange Nat. Bank v. Garvan*, 273 Fed. 43, 48 (C. C. A. 2d, 1921), *affd. sub. nom. Simon v. American Exchange National Bank*, 260 U. S. 706 (1922).]

#### CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted.

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property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. \* \* \*

\* \* \* \* \*

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

\* \* \* \* \*

SEC. 17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court, as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."